

**COMPLETE STATEMENT OF**  
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**BEFORE THE**  
**COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS**  
**SUBCOMMITTEE ON AIR QUALITY, WETLANDS, PRIVATE PROPERTY AND**  
**NUCLEAR SAFETY**  
**UNITED STATES SENATE**  
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**INTRODUCTION**

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to provide testimony on the President's FY 2001 budget request for the Army Regulatory Program and recent regulatory program initiatives. I am Michael L. Davis, Deputy Assistant Secretary of the Army for Civil Works. As the Deputy Assistant Secretary responsible for Civil Works Policy and Legislation, I am directly involved in the regulatory initiatives of the Army Corps of Engineers. The Army has full responsibility for the administration of the regulatory programs implementing Sections 9 and 10 of the Rivers and Harbors Act of 1899 and primary responsibility, along with the Environmental Protection Agency, for implementing Section 404 of the Clean Water Act (CWA).

In this statement I will provide a short overview of the regulatory program and current levels of performance. I will also discuss recent high priority regulatory initiatives involving changes to the Army nationwide permit program and the establishment of an administrative appeals process. I will conclude with an overview of the regulatory budget.

**ARMY REGULATORY PROGRAM**

The cost for operating the Army regulatory program over the last ten years has risen steadily. This increase has come about as changes in law and policy have resulted in the need for new initiatives to maintain and improve levels of environmental protection and service to the regulated public. During FY 1999, the Army Regulatory Program provided written authorization for over 90,000 activities, the most in any year. Over 90

percent of all those actions were authorized in less than 60 days, a remarkable accomplishment. The performance statistics cited in the remainder of this testimony reflect only a portion of this work, which is accomplished by approximately 1,100 regulatory staff members nationwide. These highly skilled and dedicated men and women are responsible for the thousands of permitting and enforcement decisions made each year.

## **CWA SECTION 404 PROGRAM PERFORMANCE**

The CWA Section 404 program is a vital part of the Nation's overall effort to protect, restore, and preserve our water resources. The overarching statutory goal of the Section 404 program is to protect the waters of the United States, including wetlands. Over the past 28 years the Army Corps of Engineers has prevented the destruction of hundreds of thousands of acres of wetlands and the degradation of thousands of miles of rivers and streams. This has reduced property damage and loss of lives from flooding and protected fish and wildlife habitat and water quality - - all vital to the Nation's economy and overall health. From a good public policy and investment perspective, the Section 404 program has been a success. For example, the Section 404 program played a key role in reducing wetlands losses from over 400,000 acres per year in the mid-1970's to approximately 100,000 acres a year in the mid-1990's.

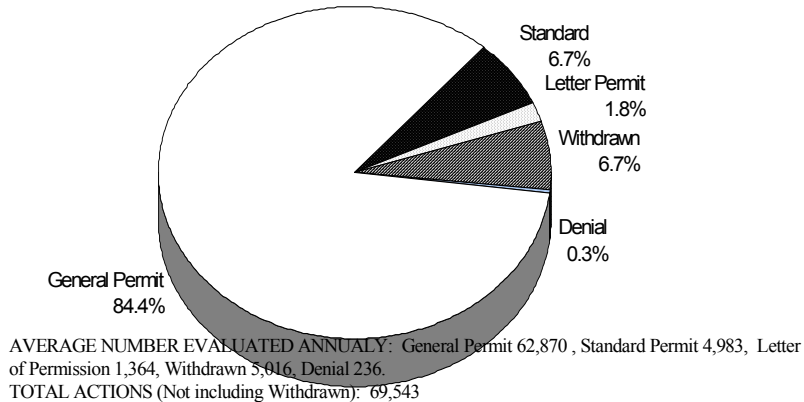
While the program helps stem the loss of wetlands and other aquatic resources, it does so in a manner that minimizes the unnecessary regulatory burdens on those that must apply for permits. Administering the Army Regulatory Program in a fair, flexible and effective manner has been a priority of the Administration since 1993. In short, permit applicants receive a timely and professional response from the Corps. As with any program of this nature there will be a few exceptions - - but these are truly the exception to the tens of thousands of regulatory actions that are handled smoothly each year.

The graphics provided throughout this statement highlight the operation and performance of the CWA Section 404 program. As shown in Figure 1, the Corps received an average of 74,500 Section 404 permit requests per year from FY 1996 to FY 1999. Of those requests, 84.4 percent were authorized through a general permit. Only 6.7 percent of all permit applications were subject to the more detailed individual permit evaluation, through which impacts are avoided and compensated. Because of our effectiveness in avoiding and mitigating impacts, only 3 tenths of a percent of all Section 404 requests were denied. Finally, it should be noted that thousands of additional actions requiring authorization by Section 404 were allowed to proceed under the authority of general permits that do not require any notification to the Corps.

Figure 1.

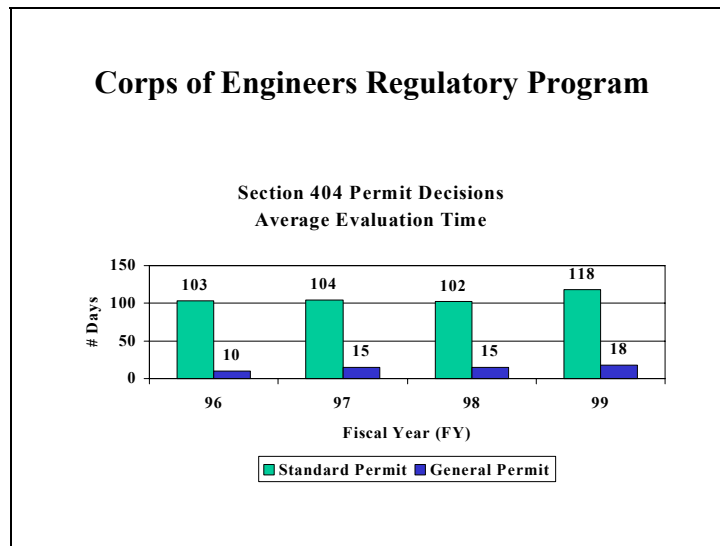
## Corps of Engineers Regulatory Program

FY 1996 - FY 1999 - Section 404 permit Decisions  
(average annual numbers)



The number of days required to evaluate requests for standard individual permits and general permits are provided in Figure 2. From FY 1996 to FY 1999, decisions for standard individual Section 404 permits took an average of 107 days, with decisions for general permits averaging only 14 days. As Figure 1 demonstrates, the general permit program is an important part of the overall regulatory program. By providing a screening mechanism for activities with minimal adverse effects, general permits allow the Corps to focus its priorities and resources on those activities with the potential for greater environmental impacts. Those activities that are truly minor are allowed to go forward with little or no review by the Corps while a relatively few are subject to a more thorough individual review.

Figure 2.



## GENERAL PERMITS

Section 404(e) of the CWA provides the Secretary of the Army the authority to issue general permits subject to the following requirements:

- General permits must be for a category of activities;
- General permits may not result in more than minimal impacts either individually or cumulatively; and
- General permits may be issued only after an opportunity for public notice and comment and are valid for no more than five years.

Since the addition of Section 404(e) in 1977, the Army has used the general permit program to authorize hundreds of thousands of activities nationwide. These general permits have been issued on a nationwide basis (nationwide permits), on a Corps district basis (regional general permits), and on a programmatic basis. As noted in Figure 1 above, the general permit program continues to be an integral part of the Army Regulatory Program – authorizing over 80 percent of all CWA Section 404 activities.

## RECENT NATIONWIDE PERMIT REVISIONS

The most widely used general permits are the Nationwide Permits (NWP) issued by the Corps headquarters in consultation with my office and other agencies. Of the nearly 40 NWPs, Nationwide Permit 26 (NWP 26) was used the most by permitting a wide variety of activities in specific waters (i.e., headwaters and isolated waters). NWP 26 also engendered considerable controversy and was the subject of litigation by the

environmental community who argued that it did not meet the statutory requirements of CWA Section 404(e) discussed above.

In 1977, the Corps issued the first NWP 26 and authorized *unlimited discharges* of dredged or fill materials into non-tidal rivers, streams and their impoundments including isolated wetlands and adjacent wetlands that were located in the headwaters of river systems. The term “headwaters” was administratively defined, as the point on a non-tidal stream above which the average annual flow is less than 5 cubic feet per second. In 1986, the Corps issued a revised NWP 26, which *authorized impacts up to 10 acres* and required that the Corps be notified of proposed discharges greater than one acre.

As our scientific understanding of the importance of headwater systems and isolated wetlands improved, we became concerned that, from a national perspective, some of these activities authorized by NWP 26 probably had more than minimal adverse impacts on the aquatic environment. The concern was that NWP 26 authorized too many projects in the headwaters and isolated waters, increasing the frequency of flooding, destroying valuable fish and wildlife habitat and impairing water quality. Further, many continued to question the legality of NWP 26 - - casting doubt and uncertainty on the entire nationwide permit program.

The validity of the underlying basis for NWP 26 was questioned by the National Academy of Sciences in a study undertaken at the direction of Congress. In the part of its 1995 report that addressed NWP 26, the Academy concluded that “The scientific basis for policies that attribute less importance to headwater areas and isolated waters than to other wetlands is weak.” The enormity of environmental resources at risk was highlighted by 1995 data from the Corps, which showed that over 25 percent of all permitted wetland losses were the result of NWP 26. Over 80 percent of all wetland losses associated with general permits were the result of NWP 26.

The President’s 1993 Wetlands Plan called for a review of NWP 26 and the 1998 Clean Water Action Plan promoted increased wetlands protection through more effective avoidance and compensation of impacts. Further, the Administration has been unequivocal in its promotion of the wise and sustainable use of our floodplains. Every year lives are needlessly lost and the Nation spends over four billion dollars paying for flood damages.

In 1996, the Army again modified NWP 26 and reduced the *maximum allowable impacts from 10 acres to three*. The Army also committed to further improving environmental protection by replacing NWP 26 with more environmentally appropriate activity based NWPs. In this regard, on March 7, 2000, after several opportunities for public comment, the Corps issued five new permits and modified five existing NWPs. The new and modified NWPs will become effective June 7, 2000. NWP 26 will remain in effect until then. These permits substantially improve environmental protection while allowing those activities that are truly minor to go forward with little or no review.

Under the new NWP program only those activities involving less than one-half acre of impacts will be allowed under a NWP. In addition, any activity involving more than one-tenth acre of impacts requires the notification of the Corps. To reduce adverse impacts from flooding caused by development in the floodplain, we have also added a permit condition that prohibits the use of most of the NWPs in much of the 100-year floodplain. We have also added a condition that prohibits the use of the NWPs in "critical resource waters" (e.g., critical habitat for endangered species and wild and scenic rivers). Not all changes, however, have resulted in restrictions on the use of NWPs. For example, unlike NWP 26, the use of the new NWPs is not limited to the headwaters and isolated waters. In addition, the scope of certain NWPs such as NWP 12 for utility crossings has been expanded to increase their utility and applicability.

As we developed the new NWPs we not only considered the need to improve environmental protection, we also considered the effect of such changes on the Corps workload and the regulated public. Based on our review, we are confident that the final changes made on March 7, 2000, are needed and justified by the increased environmental protection. Further, these changes substantially increase the legal sustainability of the NWP program and consequently provide the regulated public much greater certainty. There is no denying that the Corps workload will increase as a result of these changes. Our preliminary estimates indicate that the number of individual permit applications may increase, perhaps on the order of 20 percent. Notwithstanding this estimate, the Corps predicts that the vast majority, over 85 percent, of Section 404 activities will continue to be covered by general permits.

In short, while the Corps Section 404 workload will increase and without some additional funding program performance may be diminished, we believe that cleaner water, healthier habitat, and reduced damages from flooding are worth the costs.

## **ADMINISTRATIVE APPEALS**

As stated above, we strive to administer the regulatory program in a fair and flexible manner - - eliminating unnecessary regulatory delays and costs. I believe that overall we have been very successful. Most permit applicants receive a permit in a timely manner. The environment is protected through the regulatory program's avoid, minimize, and compensate sequencing policy. As with any program, improvements can be made. In the case of Section 404 we should continue to improve the protection of important aquatic resources and continue to look for ways to improve responsiveness to the public. We are committed to both of these objectives.

In the 1993 President's Wetlands Plan, the Administration made a commitment to develop an administrative appeal process for those permit applicants that believe they received unfair or adverse permitting decisions. The Wetlands Plan called for an administrative process to provide landowners an opportunity for a hearing by higher level

decision-makers, without the need for resorting to costly and time consuming lawsuits. On July 19, 1995, the Corps published a proposed administrative appeal process. After evaluating and addressing the issues raised in comments submitted in response to the proposed rule, the Corps, on March 9, 1999, published a final rule establishing an administrative appeal process for permit denials and declined individual permits. That rule became effective on August 6, 1999. In the rule the Corps noted that due to budget constraints, it was delaying publication of an administrative appeal process for jurisdictional determinations.

The FY 2000 Energy and Water Appropriations Act provided funds to administer an appeals process for jurisdictional determinations. I am pleased to note that the final rule for this last part of the appeals process will be published today. This rule establishes a one step administrative appeal process for jurisdictional determinations.

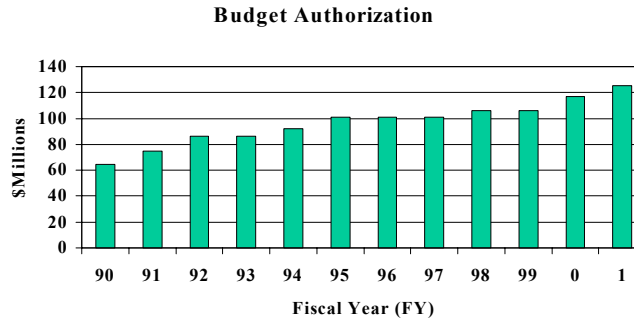
To date we have evaluated 12 request for appeals of denied permits. One has been sustained, one remanded back to the district and ten are pending. Our workload estimates indicate that approximately 150 permit denials and 5,000 wetland delineations will be appealed annually. One full time equivalent (FTE) in each of the eight Corps division offices has been provided to serve as division level review officers for these cases. The Corps estimates that operation of the appeal program will require an expenditure of approximately \$5 million per year. The appeal of jurisdictional determinations will be managed by the Corps division appeals review officers, but an additional 38 FTEs will be added to support the participation of Corps district staff.

## **REGULATORY BUDGET OVERVIEW**

As shown in Figure 3, regulatory appropriations have increased over the last ten years, from \$64.5 million in FY 1990 to \$117 million for FY 2000. The President's budget request for the Army Regulatory Program for FY 2001 is \$125 million. Program funding increases have for the most part covered only the normal year to year labor costs, along with some programmatic initiatives and special studies. In 1990, regulatory funding supported a national staff of 945 individuals. The FY 2000 regulatory appropriation will support a national field presence of approximately 1,100 regulatory personnel. This is a modest 14 per cent increase in staffing over 10 years. Increases in the regulatory budget also reflect an increasing need to improve environmental protection and to develop programmatic tools to improve overall performance.

Figure 3.

## Corps of Engineers Regulatory Program



The Army Regulatory Program FY 2001 funding request of \$125 million is necessary to ensure that we continue to provide effective and equitable regulation in the Nation's wetlands and waterways. Approximately \$5 million of this amount is needed to help address increases in workload and normal increases in cost due to inflation. Other program management efforts will also continue as in past years, including specialized training of Corps personnel and technical assistance to Corps districts from the Corps Waterways Experiment Station (WES). Generally, from \$500,000 to \$1 million is allocated to WES each year for technical assistance with complex and sensitive permit cases. In addition, similar funding amounts may be allocated to other Corps labs (Civil Engineering Research Laboratory and the Institute for Water Resources) to address special program management issues. These include; studies of mitigation banking practices; improvements to automated data systems for tracking program workload and wetland impact data, and an assessment of environmental impacts resulting from nationwide permits.

The budget request for FY 2001 includes an identified increase of \$3 million for further development of specialized tools and studies to protect better the aquatic environment in sensitive areas. These studies are variously called watershed studies, SAMPs (Special Area Management Plans), or other similar designations. In these cases, the Corps in cooperation with federal, tribal, state, and local agencies analyze the functions of aquatic ecosystems in a specific geographic areas. The agencies then work together toward issuing regional general permits for development in some of the moderate to lower value aquatic areas. The advantage to this approach is that the higher value aquatic ecosystems can be identified, mapped and generally avoided (or subject to a more thorough evaluation if development is proposed). In addition, lower value or moderate



value aquatic ecosystems can be subject to authorization quickly by regional general permits, with mitigation specified, which will improve degraded or lost portions of the aquatic ecosystems in the watershed. The products from these studies provide better predictability for the regulated public, and better, more focussed protection of the aquatic environment.

## **CONCLUSION**

The Nation's aquatic resources are vital to our environmental and economic health. Our rivers, lakes, and wetlands are the lifeblood of our great landscapes. They support the fish and wildlife that we catch, hunt, and watch. They provide us with water - - an essential component of all living things. The Army Regulatory Program plays an important role in protecting these resources for today and for future generations.

Through the Army Regulatory Program we are committed to serving the public in a fair and reasonable manner while ensuring the protection of the aquatic environment as required by laws and regulations. We will continue to pursue the important initiatives described above. Our regional and nationwide general permits program will continue to be evaluated for opportunities to improve both environmental protection and performance. We have established a full administrative appeals process that will allow the public to challenge permit decisions and jurisdiction determinations without costly, time-consuming litigation. The President's budget request is needed to help maintain this level of commitment and service.

Thank you for the opportunity to provide this testimony on behalf of the Army, I will be pleased to answer any questions you or other subcommittee members may have.